COMMONWEALTH OF KENTUCKY[1]
_____ JUDICIAL CIRCUIT
_____ CIRCUIT COURT
INDICTMENT NO. _____-CR- _____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V.

_____ DEFENDANT

MEMORANDUM IN SUPPORT OF NOTICE OF INTENT TO INTRODUCE OTHER ACTS PURSUANT TO KRE 404(b)

The defendant was the live-in caretaker for the victim, John Doe. Mr. Doe employed the defendant as a caretaker for approximately 7 months prior to January 19, 2001. Mr. Doe is a functional quadriplegic. Prior to the defendant's assault, Mr. Doe was wheelchair bound having only limited use of his legs and hands.

On January 20, 2001, Mr. Doe was admitted to Community Hospital because he was suffering from subarachnoid hemorrhaging. Subarachnoiod hemorrhaging is a brain injury, usually traumatic, which involves bleeding in the subarachnoid space around the brain.

Earlier that day, a approximately 4:00 am, Mr. Doe awoke at that time and was cold, so he asked the defendant to come to his room and requested he turn up the heat. The defendant became angry and argued with Mr. Doe regarding the heater and thermostat.

The defendant then grabbed Mr. Doe around the neck with one hand and shook him up and down vigorously. The shaking was so severe; Mr. Doe started "seeing white spots" or "stars". According to the Commonwealth's expert Dr.

[1] Sample Motion, Citations need to be Shepardized before use in court.

Expert, this indicates the defendant shook Mr. Doe with substantial force. Mr. Doe said that he experienced tremendous pain as a result of the shaking. Mr. Doe described the pain he felt during the defendant's assault as a 9 or 10 on a scale of 1 – 10, 10 being the most severe pain. Mr. Doe stated he had "marks on his throat" where the defendant grabbed him. Mr. Doe also said that during the assault the defendant had socked him in the eye somehow.

Later in the morning, Mr. Doe experienced pain in the back of his head and his eye hurt badly. His neck also began to swell after the defendant's assault.

Mr. Doe was particularly vulnerable to injury. Earlier in his life, Mr. Doe had brain tumors, which were removed from off his brain. As a result, Mr. Doe suffered from quadriparalysis and had to have a ventriculoperitoneal shunt placed in his head to remove excess fluids from his brain. This preexisting brain condition made Mr. Doe particularly vulnerable to violent shaking. This is because Mr. Doe's brain had extra fluid in it, which allowed more movement of his brain than a normal adult would experience when shaken like Mr. Doe.

Upon being admitted to the hospital, Mr. Doe diagnosed with subarachnoid hemorrhaging. Dr. Expert opined that the subarachnoid hemorrhaging was a result of trauma.

Moreover, as a result of the injuries, Mr. Doe's health deteriorated while he was in the hospital. His sodium levels dropped severely. He continued to have progressive difficulty breathing. Ultimately he was unable to breath on his own. Mr. Doe had to have a tracheotomy. The subarachnoid hemorrhaging was a substantial contributing cause of Mr. Doe's subsequent deteriorating health.

When Mr. Doe was first admitted to the Community Hospital, he told the hospital staff that he had fallen out of his wheelchair. He told that to the doctors because he was afraid of a possible reprisal from the defendant. In fact, Mr. Doe had fallen out of his wheel chair the night before he was assaulted – the night of January 18, 2001. However, he was not injured at that time.

On the night of January 18, 2001, the defendant was drinking alcohol. Mr. Doe had rum and coke that night but was not intoxicated. Mr. Doe described falling out of the chair as follows: He started slipping out of his chair and was dumped on his head when the intoxicated defendant and Mr. Doe's nephew attempted to help him. He is normally secured to his wheelchair by a belt and it is the defendant's responsibility to belt him into his wheelchair. He continued to slide out of his chair onto the floor, face first, however, he landed on his hands.

The victim said he was not hurt by the fall and did not feel any pain. Moreover, he did not feel any pain when he woke prior to the defendant's assault. Mr. Doe did not start to feel any pain until the defendant grabbed and shook him by the neck. In Dr. Expert's review of the medical records, he found no description of bruising or trauma to his head consistent with Mr. Doe falling on his head. In Dr. Expert's opinion, the fall from the wheelchair was not the cause of Mr. Doe's injury.

Deputy M. interviewed the defendant on January 22, 2001. The defendant stated that on the night of January 18, 2001, he, Mr. Doe and Mr. Doe's nephew were drunk. Mr. Doe fell out of his wheel chair and hit his face. The defendant did not see any injuries. Later Mr. Doe work up. They exchanged words over the thermostat setting. The defendant said that he tucked the defendant in

afterwards pulling the covers over Mr. Doe's head. When he did so, the defendant accidentally poked Mr. Doe in the eye. The defendant claimed that he didn't do anything wrong and that he loved Mr. Doe like a brother.

PROFFERED EVIDENCE

Defendant's Prior Acts of Abuse Towards the Victim

1st Prior Incident Involving Defendant and Victim

In the summer of 2000, the defendant perpetrated an act of psychological abuse upon Mr. Doe by means of threat or force. The defendant demanded the victim drink beer from a mug. The victim refused because he did not desire beer and was incapable of holding the mug without spilling or dropping the beer. The defendant took off his belt, doubled up the belt, held the belt over his head and threatened to hit the victim. The victim complied and ended up dropping the mug with the beer.

2nd Prior Incident Involving Defendant and Victim

Near Christmas 2000, the defendant physically abused Mr. Doe. Apparently, the defendant was angry because the victim asked the defendant to turn on the gas to the victim's mobile home. Mr. Doe explained to the defendant that a safety valve was off. The defendant began to argue with Mr. Doe regarding how Mr. Doe knew the valve was off. When Mr. Doe explained, the defendant apparently angered by Mr. Doe's response, grabbed, swatted at or pushed the victim's face in an angry and violent manner.

Witness S. also witnessed this incident. During the time she dated the defendant (see below), Witness S. visited John Doe's home on 5-6 occasions. She remembered that sometime in November 2000, she was at Doe's home. Mr. Doe told

the defendant that there was some kind of problem with the gas being shut off. Mr. Doe wanted the defendant to turn on the gas. The defendant was arguing with Mr. Doe over the gas. **Witness S. saw the defendant grab Mr. Doe's face around the jaw area.** The defendant said "man stop cuz I could break your jaw." After the situation had calmed somewhat, Witness S. left the home in fear of defendant.

Other Incidents Involving Defendant and Victim

During an interview with Investigator, County District Attorney's Office, the victim explained that he was afraid of the defendant for several reasons in addition to the incidents described above. The defendant told Mr. Doe that he used to beat up people when he lived in Alabama and he used to beat them with a bat simply because he felt like it. The defendant told Mr. Doe that he beat his first wife. **The defendant described how he could sneak up on someone and snap their neck without them ever knowing what happened.** He would often yell at Mr. Doe for no reason and demand that he do things he could not do.

Defendant's Prior Assaults – Violently Grabbing Girlfriend's Necks

Prior Incident With Witness S.

Investigator from DA interviewed Witness S. on August 16, 2001. Witness S. told Investigator that she begun dating the defendant around October 2000. By the beginning of January she wanted to end their relationship because he was aggressive towards her. Witness S. explained that defendant came into the bedroom in her home. Witness S. asked the defendant why her son was crying. The defendant got up and said why are you questioning me. **The next thing Witness S.**

knew the defendant had his hands around her neck. He was choking her. She hit him below the belt, and defendant let go. He apologized afterwards.

After the defendant was placed in jail, Witness S. continued to have contact with him. On one occasion when they were talking about Mr. Doe, the defendant said that John should just put on a dress because he can't even take a punch like a man. Witness S. thought this comment was crazy in light of the victim's condition.

Prior Incident with Witness K.

On January 25, 1997, Witness K. reported to Officer, PD that the defendant had assaulted her. She told Officer that she had been living with the defendant for approximately four weeks. She had an argument with the defendant because he would not work. **The defendant grabbed her by the throat and pushed her back against the kitchen sink counter.** Witness K. was afraid for her life. The defendant kissed her on the nose and released his hand from her neck. The defendant placed his hands on her two more times.

Investigator interviewed Witness K. on Dec. 19, 2001. She told Investigator that Officer's police report was accurate. She clarified that after the defendant initially grabbed her by the throat he grabbed her by the throat 2-3 more times before finally freeing her.

Prior Incident with Witness G.

On July 19, 1993, Witness G. reported to Deputy S. that the defendant had assaulted her. She told Deputy S. that the defendant lived with her for approximately four months in her apartment in City. On this day the defendant was

sleeping and Witness G. had gotten a cup of coffee from the neighbor. When the defendant awoke, he was angry that she had not gotten him a cup as well. **He began to argue with her and grabbed her around the throat with his hands**, choking her. He then slapped and punched her knocking out her tooth. She left the residence after he ceased the assault.

Investigator interviewed Witness G. on Dec. 19, 2001. She reviewed Deputy S.'s police report and said that it was accurate. Witness G. also explained that there had been approximately six other incidents of violence during which the defendant had kicked, slapped and choked her. She said that "**choking was his thing**."

I.

THE DEFENDANT'S PRIOR CONDUCT IS RELEVANT AND ADMISSIBLE PURSUANT TO EVIDENCE CODE 404(b)(2).

Kentucky Evidence Code section 404(b) sets forth the general rule regarding the admissibility of evidence of the accused's prior conduct to prove character. However, KRE 404(b)(1) sets forth the exception to subdivision (b), authorizing the admission of evidence of the defendant's prior conduct. Evidence Code section KRE 404, subdivision (b)(1) provides evidence of other crimes may be admissible:
If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Commonwealth intends to offer the prior conduct evidence to show the defendant's intent, common scheme and plan, motive, the victim's state of mind, and that the victim's injuries were not inflicted accidentally. Evidence of uncharged acts need only meet the test of general relevancy. KRE 402. *See also, Bell v.*

Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994). The test for admissibility is that "evidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992).

A defendant's not guilty plea puts in issue all of the elements of the charged offense for the purpose of deciding the admissibility of evidence under the Evidence Code. *See e.g., Rounds v. Commonwealth*, 139 S.W.2d 736, 738 (Ky. 1940); *Commonwealth v. Gentry*, 88 S.W.2d 273, 273 -74 (Ky. 1935); *Valentine v. Commonwealth*, 284 S.W. 1114, 1115 (Ky. 1926); *Day v. Commonwealth*, 243 S.W. 1051, 1053 (Ky. 1922); *Ball v. Commonwealth*, 5 Ky.L.Rptr. 787, 81 Ky. 662 (Ky. 1884). Here, by his not guilty plea, the defendant put in issue each element of the offenses of which he is charged. Therefore, the Commonwealth is entitled to introduce prior conduct evidence in their case in chief.

A. <u>Evidence that the Defendant Violently Grabbed Three Other Victims By the Neck During the Course of His Assaults is Relevant to Show Intent.</u>

In *Walker v Commonwealth*, 52 S.W.3d 533 (Ky. 2001), the Supreme Court of Kentucky explained the rationale behind the admission of prior conduct evidence to show intent:

Where the issue addressed is the defendant's intent to commit he offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.

Walker, 52 S.W.3d at 537, *citing U.S. v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978).

In a case involving charges of sexual crimes, the Court has long recognized that the degree of similarity between the charged and uncharged acts is a critical factor in establishing a direct relationship independent of character. Billings v. Com. 843 S.W.2d 890, *892 (Ky.,1992). This is because the ascendant issue is whether the event occurred at all. However, the *Billings* Court went on to note that "in other contexts, similarity of the acts may be of lesser or even of no significance. Circumstances must dictate when similarity is necessary or a sufficient condition to show a direct relationship between the two acts." *Id.*

Here, the defendant has repeatedly and uniquely demonstrated his desire to injure person with whom he has a domestic relationship by choking them when their actions or words defy his wishes. In each instance of prior violence against Witness S., Witness K. and Witness G. described above, the defendant forcefully grabbed his victims by the neck after they did not agree with him on some issue. As described above, Witness S. confronted defendant regarding her son crying. Witness K. confronted the defendant about not working; Witness G.'s failure to get coffee for the defendant. Similar, in the present matter, Mr. Doe requested the defendant turn up the heat. In each instance, the defendant first argued with his victim and then violently grabbed each by the throat. In each instance his actions evince a wish to injure another person.

Moreover, his apology to Witness S. and to Mr. Doe after the assault indicates that he knew his acts were wrongful and that at the moment he grabbed their throats, he wished to do a wrongful act. Thus, a jury can reasonably infer, based on

defendant's prior choking of Witness S., Witness K. and Witness G., that when he choked Mr. Doe he had the requisite mental state to commit the crimes charged.

B. Evidence that Defendant Violently Grabbed Three Other Victims by the Neck During the Course of His Assaults is Relevant to Show Absence of Accident or Mistake.

Evidence of prior conduct may show that the victim's injuries were the result of an intentional act and not the result of an accident or mistake. *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997). In *Parker*, the Commonwealth prosecuted the defendant for the murder of his 22-month-old stepson. *Id.* at 211. The victim, defendant's stepson, died from multiple blunt force traumas to his body and a fractured skull. *Id.* The defendant contended that he did not know how the child received the injuries. *Id.* The prosecution was allowed to introduce evidence of prior injuries. *Id.* at 213. The defendant contended that there was no direct evidence which link him to the prior injuries. *Id.* The Court found, however, that the evidence indicated that during the time in which the child received the prior injuries, he was often in the custody of the defendant. On Appeal, the Court held the prior evidence admissible pursuant to KRE 404(b) "to demonstrate the animus of [the defendant] towards the child and to show the absence of accident or mistake. *Id.* at 214. The Court further explained that "[i]n light of the testimony by Parker that he did not know how the child was injured, the possibility of accident or mistake was a proper issue." *Id.*

Here, defendant claims Mr. Doe's injuries were due to an accidental fall from his wheelchair. Additionally, defendant claimed he poked Mr. Doe in the eye by accident but did not grab him by the throat. Defendants prior assaults of Witness S., Witness K.

and Witness G., violently grabbing each by the neck, demonstrate that defendant injured Mr. Doe by his deliberate acts and that Doe's injuries were not the result of an accident.

C. Evidence that Defendant Violently Grabbed Three Other Victims by the Neck During the Course of His Assaults is Relevant to Show Common Scheme or Plan.

In *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001), the defendant was charged with rape, sodomy, and sexual abuse of a girl he was babysitting. At trial, the prosecution introduced evidence of prior uncharged incidents committed against another girl he babysat. The Court determined that the uncharged incidents and the charged offense were sufficiently similar to support that they were manifestations of the defendant's common scheme or plan. *Id.* at 768-69.

Here, the defendant's prior assaults on Witness S., Witness K. and Witness G. bear distinctive marks of similarity with his assault on Mr. Doe.

1. In each case, defendant is involved in a domestic relationship with the victim.
2. The relationships existed less than a year.
3. In each case, defendant is the stronger party.
4. In each case, the defendant first engages in argument with his victim.
5. The argument is a manifestation of the defendant's emotional immaturity:
    a. Regarding Witness G., defendant becomes irrationally upset because Witness G. did not get him a cup of coffee when she got herself one.
    b. Regarding Witness K., defendant becomes irrationally upset when Witness K. questions him about not wanting to work.
    c. Regarding Witness S., defendant becomes irrationally upset when Witness S. asks why her son is crying.

d. In this case, defendant becomes irrationally upset when Mr. Doe asks him to turn up the heat.

6. Defendant grabs each victim by the throat irrationally.

This method of assault in reaction to these particular circumstances is defendant's particular means of obtaining control over the relationship and the victim. Defendant does so in a very distinctive manner which is designed to cause maximum fear while immobilizing the victim. Moreover, there are sufficient similarities among each incident for the jury to infer that the defendant engaged in this very specific act of violence in a systematic manner whenever confronted with a request or question which he did not have the emotional maturity to answer without violence.

D. <u>Evidence of Defendant's Prior Abuse of the Victim is Relevant to Show Motive.</u>

Kentucky Courts have often held that prior acts of violence against a victim are proper for introduction to show intent. In *Garland*, the Commonwealth introduced two previous shooting episodes involving the defendant and the victim. *Garland v. Commonwealth*, 127 S.W.3d 529, 531 (Ky. 2003), *overruled on other grounds Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005). The Court held that the two prior shooting tend to show that the defendant intended to kill the victim. *Id. See also*, *Javis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky. 1998) (previous threats showed malice or intent to kill); *McCarthy v. Commonwealth*, 867 S.W.2d 469 (Ky. 1993), *reversed on other grounds in Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001) (prior violence of one spouse against another was relevant and admissible to prove motive, common scheme or intent).

Thus, evidence of the defendant's prior abuse of Mr. Doe is relevant to show intent, motive, etc. It is particularly relevant where defendant claimed he did not do anything wrong and that he love Mr. Doe like a brother. The evidence of prior abuse shows the true nature of the defendant's relationship with Mr. Doe as well as the defendant's motive and intent during the commission of the charged act.

II.

THE EVIDENCE OF THE DEFENDANT'S PRIOR CONDUCT IS HIGHLY PROBATIVE AND IS NOT UNFAIRLY PREJUDICIAL.

Once the court determines the prior conduct is admissible pursuant to KRE 404(b), the court them makes an Evidence Code section 403 determination of its admissibility. By its wording, KRE 403 favors the admission of evidence: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Thus, the court should generally admit relevant evidence. The court, nevertheless, may prohibit the admission of the proffered evidence if the court determines the admission of the evidence will necessitate undue delay or needless presentation of cumulative evidence. In this case, there is little danger of undue consumption of time or cumulative evidence. Only two additional witnesses will be called, i.e. Witness K. and Witness G. Each will be testifying to separate incidents. These witnesses to the other prior acts will testify to issues relevant to the charged acts.

Nor is there any danger of **undue** prejudice. All evidence can be prejudicial. However, the issue is not simply whether the testimony will be prejudicial; it must be *unduly* prejudicial in order to trigger KRE 403. *Price v. Commonwealth,* Ky., 31 S.W.3d 885, 888 (2000) ("[T]he real issue is whether [the defendant] was *unduly* prejudiced, *i.e.,* whether the prejudice to him was unnecessary and unreasonable."). In the criminal context, prejudice is defined at "unnecessarily or unreasonably hurtful." *Romans v. Commonwealth,* Ky., 547 S.W.2d 128, 131 (1977). As noted *supra,* the evidence of the defendant's prior conduct truthfully portrays the defendant's intent, motive, common scheme and plan and absence of mistake or accident.

The greater the tendency of the prior conduct to prove the material fact, the greater its probative value. The greater its probative value, the less likely the claimed prejudice is to substantially outweigh the probative value. Here, the defendant's prior acts of abuse towards the victim explained his actions on the night of the charged acts. Without this relevant context it will be hard for a juror to comprehend how or why a person who is charged with a quadriplegic's care could resort to such violence. Moreover, the evidence of defendant's prior assaults demonstrates both how Mr. Doe was injured and that the injuries were not the result of an accident as the defendant claims.

Evidence that defendant violently grabbed three other victims by the neck during the course of prior assaults is highly probative because it comes from three independent witnesses. Moreover, defendant's assault on Witness K. was investigated by a separate law enforcement agency.

The time between the prior conduct and the charged acts will not cause undue prejudice here because the oldest prior incident occurred less than eight years prior to the charged acts. Most occurred within four years of the charged acts. *See English v. Commonwealth*, (uncharged acts took place years before charged crimes).

CONCLUSION

As set forth above, evidence of the uncharged acts are admissible pursuant to KRE 404(b). Each incident is highly probative to the issues of the defendant's intent, motive, and common scheme and plan. Moreover, several of the incidents are relevant to show the victim's injuries were not the result of an accidental fall. Given that the probative value of this evidence substantially outweighs any possible prejudice to the defendant, the Commonwealth respectfully requests that the court admit into evidence the defendant's uncharged acts.

Respectfully submitted,

_____

(Name)
(Address)
Counsel for the Commonwealth